Supreme Court, U.S.
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NO. 93-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COUNTY OF BERKS, PENNSYLVANIA, *et al.*,

Petitioners,

v.

MERRY J. MURTAGH, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the interlocutory judgment of the Supreme Court of Pennsylvania finding subject matter jurisdiction is a "final order" within the meaning of 28 U.S.C. § 1257(a)?

2. Whether a state is required by the Supremacy Clause of the U.S. Constitution to adjudicate under the Civil Rights Act, 42 U.S.C § 1983, a class action challenge to a county's "Welcome Stranger" policy?

PARTIES TO THE PROCEEDING

Petitioners' statement of the parties to the proceeding is correct. Respondents have no parent or subsidiary companies to list pursuant to Rule 29.1.

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JURISDICTION

For the reasons set forth in Point I, infra., Respondents contend that this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review an interlocutory order of a State Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1257(a) of Title 28, United States Code, provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl.2.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Steadily increasing real estate values in Berks County, Pennsylvania created a gaping disparity among property assessments--and therefore taxes paid--between long-term residents and newcomers. Dubbed a "Welcome Stranger" policy, this practice requires newcomers to pay a disproportionate amount of taxes to support local government. Although mandated by State constitution and statute to use a "current value" system of real property taxation,[1] see Pa. Const. Art. VIII, § 1; 72 Pa. C.S. § 5020-101 et seq., governmental entities in Berks County utilized a system of "spot assessment," that is, reassessment for property tax purposes of only those parcels which change ownership for fair market value. App. at 147a.

Five years ago in Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989) this Court declared unconstitutional a West Virginia practice of de facto discrimination engendered by a "Welcome Stranger" policy in a "current value" system of real property taxation. The property tax assessment practices in Berks County resemble the practices in West Virginia with one notable exception: while the West Virginia county had not performed a general reassessment for over ten years, Berks County never conducted a county-wide reassessment in its history. In short, the Petitioners' scheme of

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[1] A "current value" system requires that all property be taxed at a uniform rate according to its current estimated actual market value. By contrast, an "acquisition value" system, such as was approved by the Court in Nordlinger v. Hahn, ___ U.S. ___, 112 S.Ct. 2326 (1992), assesses property only when it changes hands at its acquisition value.

taxing real property in Berks County is constitutionally indefensible and the deprivations profound.

Respondents are recent residents and taxpayers in Berks County who filed this class action in state court alleging a single cause of action under the federal civil rights law, 42 U.S.C. § 1983, and seeking damages for overpayment of taxes. The trial court overruled the demurrer of certain local governments to the Amended Complaint but certified for appeal the issue of whether the local governments could be liable under § 1983 for the wrongful assessment practices of the Board of Assessment Appeals. The Commonwealth Court, Pennsylvania's intermediate appellate court, never reached this issue. Certain respondents raised for the first time on appeal whether the state court had subject matter jurisdiction over a § 1983 case challenging local taxation. The Commonwealth Court ruled that plaintiffs could not bring their § 1983 action in state court because state administrative and judicial remedies are plain, adequate and complete. Greenwich Township v. Murtagh, 144 Pa. Commw. 624, 601 A.2d 1352 (1992) App. 19a-34a.

The Pennsylvania Supreme Court granted certiorari and, after briefing and oral argument, reversed. The Pennsylvania Supreme Court ruled that:

> where plaintiffs are a class of the taxpayers challenging the constitutionality of the system by which property tax assessments are made, they can maintain their section 1983 suit in common pleas court without first exhausting their statutory remedies.

Murtagh v. County of Berks, 634 A.2d 179, 185 (Pa. 1993) (reprinted in App. at 13a) The court specifically reserved decision on whether state remedies are plain, adequate and complete, and remanded the case to the Commonwealth Court for consideration of the issue certified for appeal.

Petitioners filed the instant Petition for Certiorari within the prescribed period.

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari should be denied since there is no jurisdictional basis under 28 U.S.C. § 1257(a) for review of an interlocutory order of a state court. Furthermore, the Supreme Court of Pennsylvania reserved decision regarding whether state remedies are plain, adequate and complete, and specifically limited its ruling to class actions challenging systematic practices. The narrow scope of the Pennsylvania Supreme Court's holding thus makes this case inappropriate for review.

I.

The Interlocutory Order of The Pennsylvania Supreme Court, Resolving A Single Federal Issue, Is Not A Final Judgment.

The sole basis of jurisdiction upon which Petitioners rely in their Petition for a Writ of Certiorari is 28 U.S.C. § 1257(a). Under that statute, the United States Supreme Court has jurisdiction to review only "final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." The final judgment rule has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a State Court . . . ." Flynt v. Ohio, 451 U.S. 619, 620 (1981) (quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945)); see also O'Dell v. Espinozo, 456 U.S. 430 (1982) (United States Supreme Court dismissal for want of jurisdiction of a

§ 1983 action because state supreme court remanded case for trial). "This prerequisite to review derives added force when the jurisdiction of [the United States Supreme] Court is invoked to upset the decision of a State Court." Radio Station WOW, 326 U.S. at 124. The reason for this rule is plain: it avoids piecemeal review by the United States Supreme Court of state court decisions thereby minimizing federal court intrusion into state affairs. See Flynt, 451 U.S. at 621.

The Petition for a Writ of Certiorari filed by Petitioners is devoid of any jurisdictional basis, since the State Supreme Court's opinion is interlocutory. The Pennsylvania Supreme Court remanded this matter to the Commonwealth Court of Pennsylvania with direction to address the further contention raised by the boroughs, townships, school districts and the City of Reading (hereinafter referred to as "the local governments") that the local governments cannot be liable under § 1983 because it is purportedly the County of Berks and the Board of Assessment Appeals, not them, who perform the unlawful assessments. According to the local governments, plaintiffs are attempting to impute liability to the local governments under a theory of respondeat superior. This issue itself raises federal issues and is sufficient reason to render a matter nonfinal and nonreviewable. See San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 632-33 (1981).

This case does not fall within any of the narrow exceptions to the final judgment rule mentioned by the Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-85. There is no identifiable federal policy that will suffer if the state proceeding goes forward. Flynt, 451 U.S. at 622. Indeed, the federal interest in adjudicating § 1983 disputes is advanced by permitting the state trial court, which has concurrent original jurisdiction of § 1983 disputes, to finally decide the case. Nor does this case fit within the exception based upon a separate and independent issue. It cannot be said that the issue in question will survive and require decision regardless of the outcome of

further state proceedings; nor, can it be said that subsequent proceedings "could not remotely give rise to a federal question . . . that may later come here . . . ." Cox Broadcasting Corp., 420 U.S. at 480 (quoting Radio Station WOW, Inc., 326 U.S. at 127). The very issue remanded by the State Supreme Court is a federal question, and further litigation of this § 1983 case likely will raise still more federal questions.

Accordingly, the Petition for a Writ of Certiorari must be denied.

II.

The Supreme Court Of Pennsylvania's Reservation And Limitation Of Issues Renders It Inappropriate For Review By This Court.

In its decision, the Supreme Court of Pennsylvania reserved decision regarding whether the state statutory remedies are "plain, adequate and complete." Thus, even were this Court to grant certiorari and reverse the State Supreme Court, that Court could still decide the reserved issue adversely to Petitioners. The Supreme Court of Pennsylvania also specifically limited its ruling to class actions challenging systematic property assessment practices. It left open the question of whether an individual plaintiff, as opposed to a class of plaintiffs, can maintain a § 1983 action in state court without first exhausting state statutory remedies where the challenge is to an individual assessment. This reservation and limited holding thus makes this case inappropriate for review. Not only is the question presented for review by Petitioners based upon an assumption of state law that has not been decided by the State Supreme Court (i.e., that the state statutory remedies are "plain, adequate and complete"), the narrowness of the State Supreme

Court's holding simply does not present a question sufficient to justify review by the Court at this time.

CONCLUSION

For all the foregoing reasons, Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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